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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

ROBERT P. BURRUS, et al., *Appellants*,

v.

WOODROW W. WILKERSON, etc., et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

BRIEF SUPPORTING JURISDICTIONAL STATEMENT FOR AMICI CURIAE

American Federation of Labor–Congress of Industrial Organizations

International Union, UAW

Western Center on Law and Poverty

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Interests of Amici

The American Federation of Labor–Congress of Industrial Organizations is a federation of 122 national and international labor organizations having a total membership of approximately 12,500,000. The American labor movement has throughout its history sought maximum educational op-

portunity for all children. Unions played a major role in the establishment of public schools early in the 19th century and have continuously worked for the extension and improvement of public education. This case directly involves the quality of schooling and the integrity of the public education concept in theory and in practice throughout the United States.

The United Automobile Workers and its nearly one and a half million industrial-worker members are vitally interested in quality public education for all our children. Having long supported the interests of the disadvantaged and the poor, UAW believes strongly in equality of educational opportunity and believes that a public education system built on inequality plainly violates fundamental constitutional guarantees.

The Western Center on Law and Poverty, funded primarily by the Office of Economic Opportunity, is a consortium of OEO-supported legal services programs and law schools in Southern California. It serves as a central research and technical assistance agency for these legal services programs, and has been active in efforts to achieve equality of educational opportunity for the poor. Lawyers affiliated with the Center are counsel for plaintiffs in *Serrano* v. *Priest*, No. 938254, Superior Court, County of Los Angeles, similar to the case now before this Court.

Letters of consent by appellants and appellees in this case to the filing of this brief amici curiae have been filed with the clerk of this Court.

Statement and Argument in Support of Probable Jurisdiction

In this case the Court's attention is directed more clearly than it was upon the confused pleadings in *McInnis* to tragic inequalities in the public education schemes of our states,

which undercut the central premise of our public education system. In its early years the public education movement in the United States gave promise of a great egalitarian reform: the children of poor families unable to afford private education would receive their preparation for life and livelihood through public support. J. Quincy, Municipal History of the Town and City of Boston 21-22 (1852). See *Brown* v. *Board of Education*, 347 U.S. 483, 493. As Horace Mann stated it: "Education . . . prevents being poor." But it was soon discovered that some localities were too impoverished to bear so significant a fiscal burden from local tax revenues; accordingly, early in the development of our public education systems most states adopted equalizing "flat grant" and "foundation plan" payments of direct state money supplements to local school districts. Today it is clear that these state aid measures have failed in their egalitarian intent. For in numerous states (including the largest and most populous) there exists a first rate public education for some children, only passable schooling for others, and a vastly inferior public education for children in poorer areas—chiefly our central cities and small rural localities.

Public education in many of our states presents a picture of four-fold inequality: i. gross malapportionment of school districts with respect to their resources for school finance; ii. great disparities (as much as 7 to 1) between school districts in per-pupil expenditures; iii. vast inequalities in the public education thus provided for children within the same state; and iv. inferior public schooling and preparation for life and livelihood for the poorest and most needy children. These multiple inequalities underly this case and similar suits pending in state and federal courts in California,[1]

[1] *Serrano* v. *Priest*, No. 938254, Superior Court, Los Angeles County, and *Silva* v. *Atascadero Unified School District*, No. 59554, Superior Court, San Francisco County.

Michigan,[2] Texas,[3] and Wisconsin,[4] which invoke substantial equal protection issues under this Court's previous decisions. See generally, Horowitz, *Unseparate but Unequal—the Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. Rev. 1147 (1966).

Malapportionment of School Districts. The ultimate cause of the constitutional infringements presently in issue is the malapportionment (or non-apportionment) of school districts with respect to their ability to finance public education. Under state laws and constitutions throughout the nation, public education is a state responsibility and the establishment of school districts and operation of public schools is regulated by state law.[5] Typically, the legislature provides that, except as supplemented by state payments to local districts, the principal fiscal burden for the operation of public schools is borne by local levy of taxes upon property within the school district. A. Wise, *supra* note 5 at 127. Due to historical fortuity aggravated by the force of political inertia, today's school districts are grossly malapportioned with respect to their ability to finance from local revenues the education which it is their function to provide. Measured by per-pupil assessed property values in the district, the magnitude of the malapportionment in inability to finance

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[2] *Detroit Board of Education* v. *Michigan*, No. 103342, Circuit Court, Wayne County, Mich.

[3] *Rodriguez* v. *San Antonio Independent School District*, No. 68-175 S.A., U.S.D.C., W.D. Tex.

[4] *Bellow* v. *Wisconsin*, No. 127060, Dane County Circuit Court, Wisc.

[5] State constitutions commonly provide that public education is a state function entrusted to the preservation and control of the legislature. Mich. Const., art. VIII; Ill. Const., art. VIII; Cal. Const., art. IX. See *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 657 (E.D. La. 1961) *aff'd*, 368 U.S. 515. See also N.Y. Consol. Laws §§ 310, 1505 (McKinney 1953); Mich. Stat. Ann. 15.3402 (1968); *Kinney* v. *County Bd. of School Trustees*, 7 Ill. App. 2d 286, 289, 129 N.E. 2d 292 (1955); *County School Trustees* v. *Common School District No. 6*, 284 S.W. 306, 307 (Tex. Civ. App. 1926); A. Wise, Rich Schools, Poor Schools, 93-112 (1968).

education at comparable property tax rates is typically on the order of 50 to 1, 100 to 1, and even greater disparities between the state's wealthiest and poorest districts. In Michigan the River Rouge District's property valuation per pupil is $53,156, while Forsyth's is $1,319; in California the Big Creek District has $306,077 per average daily pupil attendance, while Olinda District has $3,698; the range in New York is from over $200,000 to under $5,000.[6]

ii. *Disparities in School Funding.* The malapportionment of school districts with respect to their taxable wealth results in great disparities in school funding, notwithstanding state "equalizing" supplements and the heavier tax rates which poorer districts typically impose to meet minimum education requirements. Thus, most states provide per-pupil "flat grants", and "foundation plan" supplements to school districts in amounts as high as $300 or $400 per child—supplements usually somewhat weighted to favor the poorer school districts. However, the state aid amounts are usually at or near the lowest per-child expenditure levels in the state so that their equalizing impact is very limited. Then, too, poorer districts tend to impose on themselves substantially higher school tax rates to produce school revenues, as the District Court conceded in the present case involving Bath County, Virginia. Yet these efforts to reduce the impact of school district malapportionment leave gross inequalities, as high as 7 to 1, between the per-child expenditure in the state's wealthiest and poorest district. Thus, in Virginia the annual per-child expenditure ranges from $541 in Arlington County to $72 in Buchanan County; in California from $1,353 in one elementary school district to $265 in another; in New

[6] See J. A. Thomas, School Finance and Educational Opportunity in Michigan 20 (1968); California State Department of Education, Average Daily Attendance and Selected Financial Statistics of California School Districts 1965-66, pp. 134, 115 (1967); Allen, *The State, Educational Priorities, and Local Financing*, Integrated Education 55, 58-59 (Sept.-Oct. 1968).

York from $1,600 to $470.[7] See also Office of Education, HEW, Profiles in School Support 70-74 (1965). No discernible pattern underlies the differing levels of per-child public school expenditure within different districts of the state. A map of school district expenditure levels is a crazy quilt of fortuitous differentiation, because the state's investment in the public education of its children simply reflects haphazard variables of disparate local wealth.

iii. *Inequality in Education Offering.* What children receive in public schools is not money but education. Thus, the ultimate test of equal protection in public education looks beyond school district wealth and expenditures to the actual education offered to school children. Such scrutiny confirms the obvious: a child receiving a public school education at an annual expenditure level of $400-$500 is afforded schooling far inferior to the child for whom $1,000 is expended in a wealthier district. To some extent a poor district can compensate (at the price of inferior teaching capability) by paying lower salaries. Cost reduction is also achieved by having fewer teachers, thus suffering large and overcrowded classes with a reduced teaching and learning capability. Poorer districts also must forego facilities expensive to procure and maintain—libraries, laboratories, gymnasiums, special courses, remedial instruction, counseling, and the like. These disadvantages have been highlighted in a recent study by the Michigan Department of Education—"School Finance and Educational Opportunity in Michigan" (1968). Data there set forth (pp. 22-57) show the closest correlation between annual per-child expenditure levels and such education elements as class size, special classes and programs, teacher preparation, full-time principals, counseling services, research and testing, science laboratories, and library facili-

[7] Study Committee, Raising the Level of Public Education in Virginia 98-103 (1967); Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place within a State*, 15 U.C.L.A. L. Rev. 787, 806; Allen, *supra* n. 6 at 58.

ties. Similarly, a recent Virginia report revealing school district disparities of per-pupil expenditures as great as 7 to 1 demonstrates parallel disparities in the districts' number of classrooms with more than 30 students, and in the percentage of teachers with degrees and some form of certificates.[8] These correlations demonstrate the obvious truth that more money buys a better education. In sum, the available evidence shows that, as a consequence of existing school district malapportionment children in wealthier school districts receive a quality public education while those in poorer districts are offered cheap and inferior schooling.

iv. *Inferior Public Education for the Poor.* The ultimate paradox illumined by the pending case is that while children in the state's affluent areas enjoy high quality public education, the children of urban slums and rural poverty who have the greater need for quality education are condemned to suffer inferior public schooling. While members of state legislatures may not consciously intend it, because community wealth is the key determinant of the public education offered the inevitable consequence of the present system is that poor children most needy of a good public education are those most often denied it.

The economics of home ownership have produced great areas of wealth and poverty within the state. Where the wealthy live property values are high and a large taxable base exists for financing public schools. Conversely, the poor live where property values are the lowest and where, under the present system of malapportioned school districts, the least taxable property is available for public education. The poor are thus caught in a vicious circle where the offering of unequal public education in different school districts thrusts the disadvantages of the father upon the child. From public revenue the children of wealth obtain a first rate

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[8] Study Committee, *supra*, note 7 at 35-40, 47-49, 80-82, 98-103. See also A. Wise, *supra* note 5 at 136-38.

public education enabling them to go on to college, career, and continued affluence. Meanwhile, the children of the poor are afforded inferior public schools where they are discouraged from graduating, educated too poorly to enter college, and thus prepared only for a life of continued poverty. Under the present scheme of funding in Virginia and the majority of the states, public education perpetuates the prospects of a lifetime of poverty for the children of the poor.

* * * * * * *

The foregoing exposition underlines the multiple inequalities existing in public education in most of our states and highlighted in the present case—malapportionment of school district wealth, disparities in public school funding, inequality of public education, and inferior public education for children of the poor. Each of these inequalities presents a tangible constitutional question, and manifestly the confluence of all four raises a substantial equal protection issue. See *Reynolds* v. *Sims*, 377 U.S. 533; *Morey* v. *Doud*, 354 U.S. 457; *Brown* v. *Board of Education*, 347 U.S. 483, 493; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668.[9]

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[9] In urging that grave constitutional questions arise from inequality of public education in different districts within the state, we do not mean to suggest that similar inequalities as between states of the union would invoke constitutional doubts. To suggest that states vis-a-vis the federal government are analogous to local school districts vis-a-vis the state would be to defy the teaching of history and the nature of the federal union. In a similar setting involving malapportionment, this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 574-575, recently rejected such an analogy in presently applicable terms:

> "The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union'. But at the heart of our constitutional system remains the concept of separate and distinct gov-

To the clear and compelling Constitutional issue presented in this case the ruling below gives no adequate answer. The District Court states that the existing inequality flows from "absence of taxable values [in appellants' school district] sufficient to produce the required moneys." But Virginia having chosen to operate a system of public schools, gross inequalities in the education thereby afforded do not escape the equal protection mandate simply because the state's school system has been made chiefly dependent on local taxes and thus incorporates local disparities in wealth. *There is no constitutional principal authorizing the state to perpetuate local poverty in the public school system.* Equally clearly, the District Court is in error in suggesting that it lacks the "knowledge" or "means" to require that pupils throughout Virginia "will enjoy the same educational opportunities". Educational equality, after all, was for many years judicially decreed and implemented in public school cases arising under *Plessy.* See *Brown* v. *Board of Education,* 347 U.S. 483, 486, n. 1.

In sum, the public education inequality here in issue is substantial and compelling, and the lower court's grounds for dismissal are unpersuasive. We are thus encouraged to believe that this Court will proceed to full review of the vital issue presented. Nevertheless, we must note one

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ernmental entities which have delegated some, but not all, of their formerly held powers to the single national government . . ."

"Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.' The relationship of the States to the Federal Government could hardly be less analogous."

last consideration suggested in the lower court's opinion which may be urged against such a course.

In the final paragraph of its opinion the District Court notes that the plaintiffs' "justified appeal for help" is now being examined by Virginia, and concludes that the General Assembly "undoubtedly" will come to the relief of Bath County "and other counties confronted with similar inequalities". Accordingly, we recognize that while disagreeing with the premises espoused by the District Court this Court might nevertheless decline to note probable jurisdiction because there are high prospects of prompt legislative relief. In that event, however, we suggest that the Court iterate the qualification that there is no prejudice to plaintiffs' right to reassert their Constitutional objection if within a reasonable period the Virginia legislature does not act. Such a qualification would serve to prevent undue *stare decisis* ramifications which may otherwise be attached in Virginia and elsewhere to this Court's action. Cf. dissenting opinion of Mr. Justice Marshall on Nov. 24, 1969 in *Hall* v. *Beals*, No. 39, October Term, 1969 (slip opinion at p. 1). While we cannot believe that this Court would dispose without argument and opinion of the weighty Constitutional issue concerning public education inequality, in view of the prevailing construction of a summary affirmance we urge the Court to make explicit the continuing vitality of the underlying question in the event that it should now decline full review of the merits.

Conclusion

It is submitted that probable jurisdiction should be noted.

Respectfully submitted,

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